No. 89-1469

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

DRY LAND MARINA, INC.

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I

IS THERE A DOUBLE JEOPARDY IMPEDIMENT TO THE SUBSTITUTION OF AN ALTERNATE JUROR FOR AN ILL JUROR AFTER COMMENCEMENT OF DELIBERATIONS?

II

WAS PETITIONER DENIED A FAIR TRIAL WHEN THE RECONSTITUTED JURY DELIBERATED TWO AND ONE HALF DAYS BEFORE RETURNING A MIXED VERDICT?

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COUNTERSTATEMENT OF THE CASE

Following three weeks of trial in September and October, 1986, the jury commenced deliberations on Tuesday, October 7, 1986 around 3:00 p.m. The trial judge advised the alternate jurors that they could be called back to sit as jurors. The jury was sent home at 4:30 p.m. on Tuesday after deliberating for a little over an hour. On Wednesday, October 8, the jury deliberated in the morning. At the noon hour, a juror advised the clerk that she was ill from a broken arm sustained the weekend prior to deliberations. Because of this juror's illness and another juror's prior commitment, the jury was dismissed for the day by the trial judge at approximately 2:30 p.m. It was understood at the time that it was likely that the ill juror would not be returning to the deliberations. The alternate jurors were contacted by the clerk and ordered to report the following morning.

After examining the ill juror in chambers on Thursday morning, October 9, the trial judge excused the ill juror after observing her physical condition and her answers to questions propounded to her. He then voir dired the two alternate jurors, one of whom was selected by lot. The trial judge then instructed the jury to begin again their deliberations. The jury recommenced deliberations around 9:30 a.m. on Thursday, October 9, and deliberated the balance of that day. Further deliberations continued all day Friday, October 10 and on Monday, October 13.

While the jury was deliberating, the trial court learned that the alternate juror who had joined the deliberations had engaged in a conversation prior to joining deliberations with an assistant county prosecutor.

(This prosecution has been by the state Attorney General with no involvement by the county prosecutor). During the voir dire by the trial judge on Thursday, October 9, the alternate juror affirmatively denied having discussed the case with anyone. While the jury continued its deliberations, the local assistant prosecuting attorney testified in open court that that conversation did not involve a discussion of the case.

The jury returned with their verdict at 2:10 p.m. on Monday. The jury convicted Petitioner on five counts and acquitted it on two other counts. The four individual officers and employees of Petitioner were all acquitted.

SUMMARY OF ARGUMENT

Petitioner asserts that the trial court impaired its constitutional right to a fair trial and that it was subjected to double jeopardy by having a reconstituted jury conduct deliberations when a juror was excused and replaced by an alternate. The United States Circuit Courts of Appeals are, with minor exceptions, uniform in their holding that the substitution procedure which was employed in this case does not violate the defendant's constitutional right to a fair trial. The reconstituted jury in this case deliberated two and one half days before returning a mixed verdict. Petitioner offers no evidence whatsoever that it was prejudiced in the manner by which the trial court implemented the substitution procedure, and it is Respondent's contention that this case pre-

sents no salient reason for this Court to review the decision of the Michigan Court of Appeals.

ARGUMENT

I

THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY DOES NOT PROHIBIT A TRIAL COURT FROM SUBSTITUTING AN ALTERNATE JUROR FOR AN ILL JUROR AFTER COMMENCEMENT OF DELIBERATIONS.

In United States v Jorn, 400 US 470 (1971), the question was whether the defendant could be tried a second time after the first trial had been stopped before verdict. This case presents the opposite situation. Here, the trial judge did everything within his power to bring this first trial to a fair conclusion.

Petitioner's underlying premise is that any substitution of alternate juror after deliberation has begun is prohibited by the Sixth Amendment, US Const, Am VI. Petitioner maintains that the commencement of jury deli-

berations is a bright constitutional line that, without regard for circumstances, may never be crossed.

In support of that premise, Petitioner cites two older court of appeals cases, United States v Hayutin, 398 F2d 944 (2nd Cir, 1968), cert den sub nom Hayutin v United States, 393 US 961 (1969); and United States v Baccari, 489 F2d 274 (10th Cir, 1973), cert den 417 US 914 (1974), that only cursorily treat the issue. Neither case finds a constitutional violation. Their final authority, People v Ryan, 19 NY2d 100; 278 NYS2d 199; 224 NE2d 710 (1966), is based solely upon the state constitution without reference to federal constitutional law.

Numerous recent cases from the federal courts of appeal have addressed the question whether a defendant's Sixth Amendment rights

were violated where an alternate juror replaced a discharged deliberating juror. In United States v Hillard, 701 F2d 1052, 1056 (2nd Cir, 1983), cert den 461 US 958 (1983), the Second Circuit found, in an extensive discussion, that the defendant's Sixth Amendment rights were not violated by the substitution of an alternate juror after the commencement of deliberations. Other circuit courts of appeal have reached the same result. United States v Phillips, 664 F2d 971 (5th Cir, 1981), cert den sub nom Meinster v United States, 457 US 1136 (1982); United States v Kopituk, 690 F2d 1289 (11th Cir, 1982), cert den sub nom Kopituk v United States, 463 US 1209 (1983); Henderson v Lane, 613 F2d 175 (7th Cir, 1980), cert den 446 US 986 (1980); Johnson v Duckworth, 650 F2d 122 (7th Cir, 1981), cert den 454 US 867 (1981); Miller v Stagner, 757 F2d 988 (9th Cir, 1985), cert den 475 US 1048 (1986).

Other state courts that have considered this problem have likewise concluded that there is no constitutional bar to substituting an alternate juror during deliberations. In Commonwealth v Kalinowski, 429 NE2d 368, 370 (Mass App, 1981), the court said:

> No fundamentals of the constitutional right to a trial by jury ... are involved in the introduction of an alternate juror into deliberations. (Citations omitted.)

In State v Miller, 79 NJ 392; 388 A2d 218, 225 (1978), the New Jersey Supreme Court found that their rule permitting substitution during deliberations does not violate the constitutional guarantee of trial by jury.

The Court of Appeals for the Ninth Circuit in Miller v Stagner, supra, p 995, approved the constitutionality of the California procedure for substituting a juror during deliberations:

> The discharge and replacement of the jurors did not violate appellants' federal constitutional rights. The California substitution procedure followed by the trial court preserved the "essential feature" of the jury required by the Sixth and Fourteenth Amendments. Williams v Florida, 399 US 78, 100; 90 S Ct 1893, 1905; 26 L Ed 2d 446 (1970), Henderson v Lane, 613 F2d 175, 177 (7th Cir, 1980), cert den 446 US 986; 100 S Ct 2971; 64 L Ed 2d 844. (Note omitted.)

The California procedure was essentially followed in this case by the in camera interview of the ill juror, the voir dire and seating of the alternate and the instruction of the jury to begin deliberating anew.

The corporate Petitioner maintains that it has a constitutional entitlement to have a verdict returned by the original twelve jurors only. The federal appellate courts have consistently held contrary. In United States v Stratton, 779 F2d 820, 831 (2nd Cir, 1985), cert den 476 US 1162 (1986), the

United States Court of Appeals for the Second Circuit stated:

> A twelve-member jury was once thought to be a constitutional requirement in federal criminal trials, see Thompson v Utah, 170 US 343; 18 S Ct 620; 42 L Ed 1061 (1898), but the Supreme Court has more recently made clear that the Constitution does not require twelve jurors for conviction, Williams v Florida, 399 US 78; 90 S Ct 1893; 26 L Ed 2d 446 (1970). In construing the Sixth Amendment right to a jury trial, applicable to the states through the Fourteenth Amendment, see Duncan v Louisiana, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968), Williams held that a six-member jury was constitutionally sufficient. The Court explicitly observed that the considerations bearing on the desirability of a twelve-member jury in federal criminal trials were left "to Congress." Id., 399 US at 103, 90 S Ct at 1907. Since Congress may legislate as to jury size, the Supreme Court may prescribe by rule, pursuant to the Enabling Act, 18 USC §§ 3771, 3772 (1982), that under certain circumstances a trial judge may excuse a juror and accept a verdict of eleven jurors. (Footnote omitted.)

See also, United States v Reed, 790 F2d 208, 210 (2nd Cir, 1986), cert den 479 US 954

(1986); United States v Gambino, 788 F2d 938, 947 (3rd Cir, 1986), cert den 479 US 825 (1986); United States v Phillips, supra; United States v Hillard, supra.

The argument raised by Petitioner has been consistently rejected by the federal and state courts that have considered the matter. There is no conflict between the courts. This Court has denied review of the issue at least eleven times previously. Petitioner has made no persuasive argument for reviewing this well-settled area of federal constitutional law. Petitioner's Sixth Amendment rights were preserved.

II

THE PETITIONER RECEIVED A FAIR TRIAL.

Petitioner's second allegation of a federal constitutional violation is that it was denied a fair and impartial jury trial as guaranteed by the Sixth Amendment as applied to the states through the Fourteenth Amendment. US Const, Am VI, XIV.

Petitioner supports this argument by reference to three cases from the federal courts of appeal. In United States v Lamb, 529 F2d 1153 (9th Cir, 1975) (en banc), the defendant was convicted at his third trial for bank robbery. The jury had deliberated for four hours before returning their verdict of guilty. The trial judge refused to accept this verdict. One of the jurors refused to continue and the trial judge replaced her

with an alternate. The reconstituted jury deliberated for twenty-nine minutes before again returning a guilty verdict.

In this case, on the other hand, the jury had heard over three weeks of testimony in a complex tax evasion scheme, had deliberated a total of less than six hours before the ill juror notified the court of her inability to continue. There had been no verdict returned to the court. The reconstituted jury, after proper instruction, deliberated for an additional two and one half days before returning its verdict. The coercive effect of a prior verdict by the jury was not operating in this case. The factual disparity between Lamb and this case is obvious.

On the other hand, the factual parallels between this case and Hillard, supra, are striking. In Hillard, the jury deliberated

for two and one half days after a two and one half week trial when one juror became ill. After interviewing the alternate, and placing him on the jury, the trial court instructed the jury to begin deliberations again. After several days of additional deliberation, the jury returned a mixed verdict, acquitting some defendants entirely, and convicting others on some or all of the counts. After the reconstituted jury retired to deliberate, alleged misconduct of one of the jurors was brought to the court's attention. The trial court held a hearing without disturbing the deliberating jury and determined that further inquiry was not warranted and declined to declare a mistrial.

In this case, the jury had deliberated for less than a full day after weeks of trial when one juror became ill. She had broken

her arm over the weekend, had no blood circulation in that arm and was groggy from strong painkillers. After conducting voir dire of the two alternates, one was selected to join the jury. The trial judge then instructed the jury to begin deliberation again. After a full two and one half days of deliberation, the jury returned a mixed verdict acquitting the individual defendants entirely while convicting the corporate petitioner on five counts and acquitting it on two counts. During the deliberations of the reconstituted jury, alleged misconduct of the alternate juror was brought to the trial court's attention. He then held a hearing without disturbing the deliberating jury.

The parallels of the factual situation between Hillard and this case are uncanny. The court in Hillard followed the lead of the

Fifth Circuit in United States v Phillips, supra, and the Seventh Circuit in Henderson v Lane, supra, in determining that there was no constitutional bar to post-submission substitution of an alternate juror. All three courts determined that the essential feature of the jury, as stated by this Court in Williams v Florida, 399 US 78, 100 (1970), was satisfied:

> The interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in community participation and shared responsibility that results from that group's determination of guilt or innocence.

Petitioner complains about the "loose procedures" followed by the trial court. Every opportunity was given to Petitioner during these proceedings to demonstrate how it was prejudiced. Petitioner's counsel refused to examine the juror or the alternate

jurors on voir dire. They refused to examine the local county prosecutor who had conversed briefly with the alternate juror prior to her entry into deliberations. Petitioner was unable to demonstrate any prejudice to the trial court or the Michigan Court of Appeals.

The corporate Petitioner claims that it was prejudiced by the offhand conversation between the alternate juror and the local county assistant prosecuting attorney. That conversation, as testified to by the local county assistant prosecuting attorney, was that the juror had indicated she was strongly convinced that the defendants were not guilty. If either party was prejudiced, it would seem to be Respondent and not the corporate Petitioner. Further, the alternate juror's attitude upon entering the deliberations was proper as it reflected what the

constitution requires: upon entering deliberations, the presumption of innocence remains. The alternate juror should have thought Petitioner and other defendants innocent upon entering the deliberations. It was the jury deliberation on the testimony and documentary evidence with the rest of the jurors that should, and in fact did, convince her of the corporate Petitioner's guilt as to the five counts of which the corporate Petitioner was convicted.

The corporate Petitioner would require this Court to presume misconduct on the part of the jury by failing to follow the trial court's instruction when the alternate was substituted into the deliberations. This presumption was rejected by the federal court of appeals in Hillard, supra, p 1059:

> Moreover, as Judge Lasker also noted, the reconstituted jury seems to have conscientiously reconsidered the case as

instructed. As the dissenters in Lamb observed:

> Rather than to presume misconduct, as would the majority, our role more appropriately is to presume that the jury has complied with the court's instructions and admonitions, absent evidence to the contrary.

This Court should not presume prejudicial misconduct without some showing of such prejudice. The corporate Petitioner has made no showing of prejudice because there simply was none.

In this case, the alternate juror had expressed an opinion in favor of the defendants prior to entering the deliberations. If either party was prejudiced, it was Respondent and not the corporate Petitioner.

The corporate Petitioner relies heavily upon United States v Lamb, 529 F2d 1153 (9th Cir, 1975). That decision was factually

distinguished by the subsequent federal cases considering juror substitution problems. In United States v Kopituk, supra, p 1310, the Eleventh Circuit noted:

> In Lamb, contrary to the instant case, the circumstances indicated a strong likelihood that the eleven original jurors coerced the substituted alternate juror into voting to convict. Prior to substitution of the alternate, the original jury had returned a guilty verdict after deliberating for four hours. The trial judge refused to accept the verdict, believing that it was reached in a manner contrary to his instructions. He declared a luncheon recess, after which one of the jurors requested to be excused, stating that she was "emotionally unable to come to a decision." The judge excused the regular juror and substituted an alternate juror instructing the jury that they had to begin their deliberations anew. Nevertheless, despite the court's instructions, the reconstituted jury returned a guilty verdict only 29 minutes after it retired to deliberate.
> 529 F2d at 1155.

See also, Hillard, supra, p 1059; Phillips, supra, p 995. The 29-minute deliberation of

the reconstituted jury in Lamb can hardly be compared to the more than two and one half day deliberation of the reconstituted jury in this case and the mixed verdict that resulted from that careful and conscientious deliberation.

This case is similar to several of those cases in which the same issue has been presented to this Court. The federal and state courts that have confronted this issue have resolved the cases consistently with the resolution and analysis made by the Michigan Court of Appeals.

CONCLUSION

Petitioner has made no showing that this case presents any issue of law contrary to the constitutional principles laid down by this Court. This Honorable Court should deny the requested writ of certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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